IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 786.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE), PETITIONER,

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT.

No. 787.

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CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Statement of the Issue.

This matter comes up on a writ of certiorari directed to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States

District Court for the Eastern District of South Caroli
dismissing the petitions of James C. Davis, Director Gen
and Agent for the President for priority of payment
claims against Charles F. Boyd & Co., Bankrupt, for frei
charges, demurrage and storage charges growing out of
Federal operation of railroads.

The District Court dismissed the petition on the grou
that the priority statute (Section 3466 R. S) did not ap
to the claims of petitioner.

The Circuit Court of Appeals dismissed the claim
priority of payment on the ground that under the Ba
ruptcy Act of 1898 the United States was not entitled
priority except for taxes.

The sole question considered below and the only quest
before the Supreme Court in these proceedings is whet
the Petitioner James C. Davis, Director General of Railro
and Agent, is entitled to priority over other claims agai
the bankrupt in payment of the foregoing claims.

The claim to priority is based on the Act of 1797, R.
3466, which provides:

> "Whereas any person indebted to the Uni
> "States is insolvent, or whenever the estate of
> "deceased debtor, in the hands of the executors
> "administrators, is insufficient to pay all the de
> "due from the deceased, the debts due to the Uni
> "States shall be first satisfied; and the priority here
> "established shall extend as well to cases in whic
> "debtor, not having sufficient property to pay all
> "debts, makes a voluntary assignment thereof, or
> "which the estate and effects of an absconding, c
> "cealed or absent debtor are attached by process
> "law, as to cases in which an act of bankruptcy
> "committed."

Both the District Court and the Circuit Court of Appeals denied the claim of the petitioner to priority, but the decisions of the two Courts are based on different grounds.

The District Court held that Section 3466 R. S. does not apply to claims for demurrage, storage and freight charges which arose out of the operation of the railroads under Federal control. The District Court said:

> "In the opinion of the Court the provisions of "Section 3466 do not apply to the claims of the peti- "tioner. That statute contemplates debts to the "United States accruing to it directly under any "statutory or contractual directions. The present "claims do not fall into these categories. They are "claims arising only incidentally to the temporary "operation by the Government of the plant of a "transportation corporation, operated by the Gov- "ernment in like manner as it would have been "operated by the corporation itself had the Govern- "ment not taken possession. The very description "of the claims shows this. They are all for freight, "storage, and demurrage charges on merchandise "transported as shipped by private parties. The "Government in possession of the railway plant of "a corporation undertook the commercial transpor- "tation of articles shipped by private persons in like "manner as the same were transported by the cor- "poration when in possession of the railway plant "and lines."

This view was distinctly repudiated by the Circuit Court of Appeals under the decisions in the cases of Dupont *v.* Davis, 264 U. S. 456 (44 Sup. Ct. 68); North Carolina R. R. Co. *v.* Lee, 260 U. S. 16 (43 Sup. Ct. 2); M. P. R. R. Co. *v.* Ault, 256 U. S. 554 (41 Sup. Ct. 593); Northern Pacific

R. R. Co. *v.* North Dakota, 250 U. S. 135 (39 Sup. Ct. 50
In re Tidewater Coal Exchange, 280 Fed. 648; Ches. & D
Canal Co. *v.* United States, 250 U. S. 123 (39 Sup. Ct. 40
Davis *v.* Cirona Coal Co., 265 U. S. 219 (44 Sup. Ct. 53
but the Circuit Court of Appeals denied priority on
ground:

First. That in bankruptcy proceedings the Bankrupt
of 1898 supersedes Section 3466 R. S. in so far as the
statutes are inconsistent and,

Second. That the United States has no priority in ba
ruptcy except for taxes.

ARGUMENT.

*Section 3466 of the Revised Statutes does not apply
claims for freight charges, demurrage or storage arising
of Federal control of the railroad systems.*

In addition to the grounds on which is rested the decis
of the Circuit Court of Appeals in this case, we maint
that the District Court was also right in holding that Sect
3466 R. S. does not apply to these claims.

That the action of the Director General to recover u
a liability arising out of Federal control is an action on
half of the United States in its governmental capacity can
be questioned under the recent decisions of the Supre
Court cited in the opinion of the Circuit Court of Appeals

Dupont *v.* Davis, *supra.*

Ches. & Del. Canal Co. *v.* United States, *supra.*

Nor is there any doubt but that in taking over and operating the railroad systems of the country the United States did so in its sovereign capacity and as a war measure.

Ibid.

North Carolina R. R. Co. *v.* Lee, *supra.*

Missouri Pacific R. R. Co. *v.* Ault, *supra.*

The fact, however, that the United States is acting in its sovereign or governmental capacity does not give it the right to priority in the payment of debts due it.

This is purely a statutory right.

A natural confusion arises in considering the question presented here because of the anomalous position occupied by the United States.

The right to priority of payment of debts is a sovereign right under the common law. The general doctrine is that it is the prerogative of the State as the sovereign to claim priority over all its subjects in the payment of debts due it, and that this priority arises and exists independent of any statute.

Marshall *v.* People, 254 U. S. 73; 41 Sup. Ct. 143.

In re Tidewater Coal Exchange, 280 Fed. 648.

Equitable Trust Co. of N. Y. *v.* Connecticut Brass & Mfg. Corp., 290 Fed. 712.

It is equally well recognized as a general proposition of law that when a State or government enters into commercial business it divests itself, so far as concerns the transactions of such business, of its sovereign character, abandons its special prerogatives and is to be treated as a private citizen.

Bank of the United States *v.* Planters Bank, 9 Wheat., 904.

Salas *v.* United States, 234 Fed. 842.

Ches. & Del. Coal Co. *v.* United States, *supra.*

Both of these established principles apply here but in reverse form.

On the one hand, although in the operations of the railroads the United States took over a business enterprise, it did so as we have seen in its governmental capacity and as a war measure.

On the other hand, though a sovereign State, the United States has no sovereign right to claim priority of payment of debts due it by virtue of such sovereignty. Petitioner must rely as he does rely solely on the provisions of the Statute. No question can arise as to the waiver of a sovereign right to priority of payment as no such sovereign right exists in the United States.

In United States *v.* State Bank of North Carolina, 6 Peters, 29, the Supreme Court said:

> "The right of priority of payment of debts due to
> " the Government, is a prerogative of the crown well
> " known to the common law. It is founded not so
> " much upon any personal advantage to the sovereign,
> " as upon motives of public policy, in order to secure
> " an adequate revenue to sustain the public burdens
> " and discharge the public debts. The claim of the
> " United States, however, does not stand upon any
> " sovereign prerogative, but is exclusively founded
> " upon the actual provisions of their own statutes."
>
> See also Equitable Trust Co. of N. Y. *v.* Connecticut Brass & Mfg. Corp. *supra.*
>
> United States *v.* State of Oklahoma, 261 U. S. 253 (43 Sup. Ct. 295).

We not infrequently find in the decisions reference to the sovereign preferential right of the United States but this is

erroneous. The right is exclusively statutory and while declared to be a policy for the good of the public it is not one of the attributes of the sovereignty of the United States. Consequently, in determining the claim of the right to priority of payment there is not involved any question of sovereign rights or immunities. We must therefore look further than the decisions which hold that the United States acted in its sovereign capacity in taking over and operating the railroad systems and that in collecting debts arising out of such Federal control the Director General is acting on behalf of the United States in its governmental capacity.

In collecting debts, the Government may be acting in its sovereign capacity, but in claiming priority, it depends exclusively on statutory authority.

Where the provisions of a subsequent law are repugnant to and inconsistent with a previously existing law the former law must yield to the latter and is to the extent of the repugnancy superseded by it.

In the case of Cook County National Bank *v.* United States, 107 U. S. 445, suit was brought in behalf of the United States, under Section 3466 of the Revised Statutes, against the Receiver of an insolvent national bank to obtain priority in payment of postal funds deposited in the bank. The Court denied any right to priority in view of the provisions of the National Bank Act, saying:

> "We consider that act as constituting by itself a
> "complete system for the establishment and govern-
> "ment of national banks, prescribing the manner in
> "which they may be formed, the amount of circulat-
> "ing notes they may issue, the security to be furnished
> "for the redemption of those in circulation; their

" obligations as depositaries of public moneys, and
" such to furnish security for the deposits, and des
" nating the consequences of their failure to rede
" their notes, their liability to be placed in the han
" of a receiver, and the manner, in such event,
" which their affairs shall be wound up, their cir
" lating notes redeemed, and other debts paid or th
" property applied towards such payment. Eve
" thing essential to the formation of the banks,
" issue, security, and redemption of their notes,
" winding up of the institutions, and the distributi
" of their effects, are fully provided for, as in a se
" rate code by itself, neither limited nor enlarged
" other statutory provisions with respect to the set
" ment of demands against insolvents or their estate

In the case of Guarantee Title & Trust Co. *v.* Title Gu
anty & Surety Co., 224 U. S. 132 (32 Sup. Ct. 457), a sur
who had paid the United States money due on a bankru
bond claimed priority of payment, under Section 3466, o
claims for labor, on the ground that it was subrogated to
right of the United States. For the purposes of the decis
the Court assumed that the surety might assert whate
priority the United States possessed. The Court denied a
right to priority in view of the provisions of the Bankrup
Act of 1898, saying:

"The act takes into consideration, we think,
" whole range of indebtedness of the bankrupt—
" tional, state, and individual—and assigns the or
" of payment. The policy which dictated it was
" neficent and well might induce a postponement
" the claims, even of the sovereign, in favor of th
" who necessarily depended upon their daily lab
" And to give such claims priority could in no e

> " seriously affect the sovereign. To deny them prior-
> " ity would in all cases seriously affect the claimants."
>
> See also Robertson *v.* Howard, 229 U. S. 263.
> Krichman *v.* U. S., 256 U. S. 364, and
> Commonwealth *v.* Allen, Commissioner of Banks, 240 Mass. 244; 133 N. E. 625, hereinafter more fully discussed in reference to the Bankruptcy Act of 1898.

The Transportation Act of 1920 *takes into consideration the whole range of activities for terminating Federal control and constitutes by itself a complete method to winding up the Government's business.*

When the necessity for the control and operation of the railroads of the country ceased, Congress passed what is known as the Transportation Act of 1920, under which Federal control of the railroad systems ceased at 12.01 a. m. on March 1, 1920. This Act is entitled:

> " An Act to provide for the termination of Federal
> " control of railroads and systems of transportation;
> " to provide for the settlement of disputes between
> " carriers and their employees; to further amend an
> " Act entitled 'An Act to regulate commerce' ap-
> " proved February 4, 1887, as amended, and for
> " other purposes."

The Act consists of five titles, Title II being devoted exclusively to the subject of the termination of Federal control. This title sets up a most elaborate and complete procedure for winding up all matters connected with Federal control and provides for everything that is essential to accomplish this. As is said by Mr. Justice Sutherland in the recent case of E. I. Dupont de Nemours & Co. *v.* James C. Davis,

Director General of Railroads, as agent, 264 U. S. 456, it "is complete in itself."

Under Section 202 of this title the President is directed to adjust, settle, liquidate, and wind up all matters including compensation and all questions and disputes of whatsoever nature arising out of or incident to Federal control. Under Section 200, the powers conferred upon the President by the Federal Control Act are continued so far as they are necessary or proper incident to the winding up or settling of matters arising out of Federal control. It is solely by virtue of this Act and of the powers vested in the President and in the agent appointed by him that the petitioner here exists or functions. Most elaborate provisions are made for determining the debts due to the United States by the railroads and for the terms of their payment. Instead of priority of payment, specific terms are set forth in Section 207 for refunding of carrier's indebtedness to the United States and for giving security for the payment of such indebtedness.

The Transportation Act having provided for adjustments between the carriers and the United States and likewise in Section 202 of all questions and disputes of whatsoever nature arising out of Federal control, and containing no provision whatever for priority of payment, it necessarily follows that no such right to priority of payment exists with reference to debts accruing to the United States as a result of Federal control and operation of railroads.

In short, the following language from the opinion of the Supreme Court in Cook County National Bank *v.* United States, *supra*, applies most aptly:

> " A law embracing an entire subject, dealing with
> " it in all its phases, may thus withdraw the subject

> " from the operation of a general law as effectually
> " as though, as to such subject, the general law were
> " in terms repealed. The question is one respecting
> " the intention of the legislature. And although as
> " a general rule the United States are not bound by
> " the provisions of a law in which they are not ex-
> " pressly mentioned, yet if a particular statute is
> " clearly designated to prescribe the only rules which
> " should govern the subject to which it relates, it will
> " repeal any former one as to that subject. Daviess
> " *v.* Fairbairn, 3 How. 636; United States *v.* Tynen,
> " 11 Wall. 88."

An examination of the Federal Control Act and of the decisions rendered with reference to it makes it still more evident that it was never intended that the provisions of Section 3466 should apply to the collection of freight demurrage and storage charges arising out of the operation of the railroad systems by the United States.

In the case of Northern Pacific Ry. Co. *et al. v.* State of North Dakota, 250 U. S. 135 (39 Sup. Ct. 502), in which the Supreme Court held that the taking over of the railroads by the President vested him with power to fix intrastate rates though such rates were in conflict with rates previously fixed by State authority, the completeness with which the entire subject matter of the rights of the United States in connection with Federal control was covered by the Federal Control Act and the proclamation of the President is forcefully expressed:

> " No elaboration could make clearer than do the
> " act of Congress of 1916, the proclamation of the
> " President exerting the powers given, and the act of
> " 1918 dealing with the situation created by the ex-

> "ercise of such authority, that no divided but a com-
> "plete possession and control were given the United
> "States for all purposes as to the railroads in ques-
> "tion. But if it be conceded that despite the abso-
> "lute clarity of the provisions concerning the control
> "given the United States, and the all-embracing scope
> "of that control, there is room for some doubt, the
> "consideration of the general context completely
> "dispels hesitancy. How can any other conclusion
> "be reached if consideration be given the compre-
> "hensive provisions concerning the administration
> "by the United States of the property which it was
> "authorized to take, the financial obligations under
> "which it came and all the other duties and exactions
> "which the act imposed, contemplating one control,
> "one administration, one power for the accomplish-
> "ment of the one purpose, the complete possession by
> "governmental authority to replace for the period
> "provided the private ownership theretofore exist-
> "ing."

In the case of Missouri Pacific R. Co. *v.* Ault, 256 U. S. 554 (41 Sup. Ct. 593), suit had been brought against the railroad company and the Director General. The Supreme Court held that the railroad company could not be held liable for the acts of the Director General, and in considering Section 10 of the Federal Control Act, which provides that "the carriers while under Federal control shall be liable to all laws, etc.," said:

> "The plain purpose of the above provision was to
> "preserve to the general public the rights and reme-
> "dies against common carriers which it enjoyed at
> "the time the railroads were taken over by the Presi-
> "dent except in so far as such rights or remedies

"might interfere with the needs of Federal opera-
"tion. The provision applies equally to cases where
"suits against the carrier companies were pending
"in the courts on December 28, 1917, to cases where
"the cause of action arose before that date and the
"suit against the company was filed after it, and to
"cases where both cause of action and suit had arisen
"or might arise during Federal operation. The Gov-
"ernment was to operate the carriers, but the usual
"immunity of the sovereign from legal liability was
"not to prevent the enforcement of liabilities ordi-
"narily incident to the operation of carriers. The
"situation was analogous to that which would exist
"if there were a general receivership of each trans-
"portation system. Operation was to be continued
"as theretofore with the old personnel, subject to
"change by executive order. The courts were to go
"on entertaining suits and entering judgments under
"existing law, but the property in the hands of the
"President for war purposes was not to be disturbed.
"With that exception the substantial legal rights of
"persons having dealings with the carriers were not
"to be affected by the change of control."

Furthermore, to recognize that the Transportation Act and the Federal Control Act cover the whole subject of the control and operation of the railroad systems by the Government, including all questions as to the right to priority of payment results in reconciling what is otherwise an irreconcilable and utterly illogical and unreasonable discrimination against those who were concerned with water transportation instead of land transportation during the war.

In its sovereign capacity and as a war measure the United States undertook to control and operate all means of transportation of goods both by land and by sea.

In order to handle ocean transportation of goods it adopted a commercial garb and organized the Emergency Fleet Corporation and abandoned its special prerogatives.

In order to handle land transportation it exercised its sovereign power of eminent domain and retained all of its governmental rights.

In both instances the purpose was the same—to prevent interference with the uninterrupted transportation of goods for war purposes.

In neither instance was it contemplated or intended to extend the power and prerogatives of the United States one hair's breadth beyond what was essential to accomplish its purpose.

In the one instance it abandoned all right to claim priority of payment by subjecting itself to the laws governing private corporations.

Sloan Shipyards *v.* United States Fleet Corporation, 258 U. S. 549 (42 Sup. Ct. 385).

United States *v.* Wood, 263 U. S. 680 (44 Sup. Ct. 134).

In the other it framed a complete system of law covering the entire subject of the relative rights, liabilities and obligations of the United States, the railroads and those who dealt with the railroads during Federal control.

The Bankruptcy Act of 1898.

The United States has no priority in bankruptcy except for taxes.

We now come to the ground on which the Circuit Court of Appeals denied the right to priority of payment.

In discussing this point we shall assume that but for the Bankruptcy Act of 1898, the United States would be entitled to priority in payment under Section 3466, although as we have shown the Federal Control and Transportation Acts complete in themselves supersede Revised Statutes, Section 3466.

Prior to the Bankruptcy Act of 1898, the right of priority existed both by virtue of Section 3466 and under the Bankruptcy Act of 1867.

Lewis *v.* United States, 92 U. S. 618.

The act of 1898, however, assigns the order of payment of all debts of the bankrupt—national, state and individual—and, so far as its provisions are inconsistent with Section 3466, supersedes the former law.

Guarantee Title & Trust Co. *v.* Title Guaranty Co., *supra.*

Cook County National Bank *v.* United States, *supra.*

United States *v.* Wood *et al.*, 290 Fed. 109 (affirmed 263 U. S. 680; 44 Sup. Ct. 134).

The decisions and course of reasoning hereinbefore cited in this brief with reference to the Transportation Act being complete in itself and superseding all earlier acts on the subject, apply even more forcibly to the Bankruptcy Act of 1898 which is complete in itself and does not bring forward Section 3466 of Revised Statutes.

The same general principles were applied by the Supreme Court in the case of *Robertson v. Howard,* 229 U. S. 263, in which the court held that the general laws relating to sales of real estate under judgments and decrees of courts of the

United States did not govern sales of real estate by courts
bankruptcy, as the Bankruptcy Act was a later law, covere
an entire subject, and was special in its nature and it pr
posed comprehensively to deal with the subjects comin
within the scope of bankruptcy legislation.

In Krichman *v.* United States, 256 U. S. 364, the sam
general rules were applied. Krichman was indicted for o
fering a bribe to a baggage porter, employed during Feder
control, under the Act of Congress of March 4, 1909, makin
it an offence to offer a bribe to a person acting for the Unite
States in an official function by or under the authority of
department or office of the Government. The Court held i
effect that the Federal Control Act did not bring forward th
former act relating to such offenses, calling attention to th
fact that "the statute creating the offense was passed lon
" before there was any thought of the Government takin
over the railroads."

Similarly, in Bardes *v.* First National Bank of Howarde
178 U. S. 524, 537; 44 L. Ed. 1175, this Court in construin
certain provisions of the Bankruptcy Act of 1898, referred t
the Act of 1867, and in comparing its provisions with th
later act, said:

> "We find it impossible to infer that when Congres
> " in framing the Act of 1898, entirely omitted an
> " similar provision and substituted the restrictive pr
> " visions of Sec. 23, it intended that either of thos
> " courts should retain the jurisdiction which it ha
> " under the obsolete provision of the earlier acts."

May we not apply the same process of reasoning (as th
lower court did) in comparing the Act of 1898, Section 6

sub-section 5, with the Act of 1867, Section 28, and note that in the Act of 1898, only taxes are given priority, whereas in the Act of 1867 *debts* and taxes due the United States are given priority.

Petitioner concedes that Section 3466 R. S. has been partially superseded by the Bankruptcy Act of 1898 and hangs his whole contention on the proper construction of Section 64 (*b*) 5 of the Bankruptcy Act.

This section provides as follows:

> "(*b*) Debts to have priority, except as herein pro-
> " vided, and to be paid in full, * * * and the order
> " of payment shall be: * * * (5) debts owing to
> " any person who by laws of the States or the United
> " States is entitled to priority."

It is the contention of the petitioner that as Section 3466 R. S. is a law of the United States by which "debts due the United States" are given priority, the United States comes within the provision of the section of the Bankruptcy Act above quoted giving priority of payment to "any person" entitled to priority by law.

It is necessary to construe the word "person" to include the United States in order to sustain petitioner's contention.

Here again we may point out an anomalous situation. The general doctrine is that the United States will not be bound by the provisions of any law in which they are not expressly mentioned. Here the contention is that the United States must be included, although specifically left out.

The Construction Placed by Congress Itself.

In determining the legislative intention in using the word "person" in this section, no better method can be adopted

than to consider the history of the steps taken in the enactment of the law as disclosed by the legislative record. This is what the Circuit Court of Appeals has done in this case with conclusive effect.

In the case of Pennsylvania R. R. Co. *v.* International Coal Mine, 230 U. S. 184 (33 Supreme Court, 893) International Coal Mining Co. sued the Pennsylvania R. R. Co to recover damages because of rebates allowed to other shippers, under the provisions of an act of Congress providing that any carrier doing any act prohibited by the statute should be liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation." Plaintiff while establishing that rebates had been allowed other shippers, neither alleged nor proved any damage to itself. It contended that this was not necessary for the reason that it was entitled to recover damages as a matter of law. The Supreme Court pointed out that while such a right of action had been expressly given in the original bill as it passed the Senate, this provision was omitted in the act as finally passed. The Supreme Court held that the fact that this provision measuring the amount of recovery by rebate was omitted from the act as finally reported to both houses and passed, was not only significant but conclusive.

See also:

United States *v.* Alexander, 12 Wall., 177.

Lewis Publishing Co. *v.* Morgan, 229 U. S. 288 (33 Sup. Ct. 867).

Chesapeake etc. Telephone Co. *v.* Manning, 186 U. S. 238 (22 Sup. Ct. 881).

Blake *v.* National City Bank, 23 Wall., 307, 319.
Platt *v.* Union Pacific R. Co., 99 U. S. 48, 64.
Church of Holy Trinity *v.* United States, 143 U. S. 457, 464 (12 Sup. Ct. 511).

A Decision of this Court in Point.

In United States *v.* Fox, 94 U. S. 315, 321, the validity of a devise to the United States of real estate in New York was held by this Court to be void because the United States was not a "person" within the meaning of the Statute of Wills. Mr. Justice Field, delivering the opinion of the Court, says:

> "There was no general power at common law to "devise lands. * * * Every person must, there- "fore, devise his lands in that State within the limi- "tations of the Statute or he cannot devise them at all. "His power is bounded by its conditions. That "Statute provides that a devise of lands may be made "'to any *person* capable by law of holding real es- "tate' * * *.
>
> "The term 'person' as here used applied to natural "persons, and also to artificial persons,—bodies poli- "tic, deriving their existence and powers from legis- "lation,—but cannot be so extended as to include "within its meaning the Federal Government. It "would require an express definition to that effect to "give it a sense thus extended. * * * a devise "to the United States of real property situated in "that State is, therefore, void."

The refusal of the Circuit Court of Appeals in the case at bar to manipulate the word "person" out of its ordinary and accepted meaning, is fully supported not only by the con-

struction which Congress is shown to have intended when the Bankruptcy Act was in the course of being passed, but also by the unanimous opinion of this Honorable Court in the case of United States *v.* Fox, ***supra.***

The Conflicting Decisions.

The Court below states that its conclusions are in conflict with the decisions in the following cases:

In re Tide Water Coal Exchange, 280 Fed. 648-650.
In re Western Implement Company, 171 Fed. 81 (41 Sup. Ct. 29).

To these petitioner adds the following:

United States *v.* National Surety Co., 254 U. S. 73.
United States *v.* Oklahoma, 261 U. S. 253.
In re Hibner Oil Co., 264 Fed. 667.
Davis *v.* Pullen, 277 Fed. 650.
In re Atlantic G. & P. Steamship, 289 Fed. 186.
Lott *v.* Salisbury, 237 Fed. 191.
Davis *v.* Miller Link Co., 296 Fed. 649.

Let us consider first the cases referred to by petitioner.

In the case of United States *v.* National Surety Co., 254 U. S. 73, the Surety Company had executed to the United States surety bonds to secure the performance of a contract. The contractor defaulted and was later adjudicated bankrupt and the loss to the Government was considerably more than the amount of the bonds. The Surety Company paid the amount due on the bonds and then both the United States

and the Surety Company proved their claims in bankruptcy and each claimed the right to priority of payment as against the other; the United States claiming under Section 3466 R. S. for the balance of its loss and the Surety Company claiming under Section 3468 R. S. for the amount it had paid the United States. The only point involved in the case is stated by the Court to be the single question whether in the distribution of the bankrupt's estate the United States has priority over the Surety Company. This question was answered in favor of the United States.

It is only by inference that this decision can be said to affect the question here; neither in the Court below nor in the Supreme Court, was the effect of the Bankruptcy Act of 1898 on these sections brought into question. As against the Surety Company, and considering solely the two sections the United States was held to be entitled to priority. That is all that the case decided and it throws no light on the point to be decided in this case. That it does not decide the question for consideration here is clearly pointed out in the decision of the Court below in the case at bar.

In the case of United States *v.* State of Oklahoma, 201 U. S. 253 (43 Sup. Ct. 295) the United States brought suit in the United States Supreme Court to establish priority of its claim against the State Bank of Guthrie for funds deposited in the bank. The bank had closed its doors, was alleged to be insolvent and was in the hands of a receiver. The sole question was whether the case came within the provisions of Section 3466 R. S. and the Supreme Court held that it did not. No question of the Bankruptcy Act of 1898 was involved in the case.

In the case of *in re* Hibner, the only question conside by the Court was whether a claim by the Director Gen for freight charges accrued during Federal control con tuted a debt due to the United States. The Court says:

> "If the claim is property of and constitutes a d due to the United States then *concededly* its prio was properly found."

On the point decided, viz: that the freight charges c stituted a debt due the United States, the Court based decision entirely on the language of Section 12, Chap. 2 the Act of Congress of March 21, 1918, known as the "F eral Control Act," and after holding that the words of Statute unqualifiedly declare the ownership of the mon and other property derived from operation of the carrier be in the United States, the Court concludes:

> "The claim for freight charges if 'property' rived from operation of the carrier during Fede control and is thus property of *and therefore* a d due to the United States. As such it is entitled the priority found."

While the freight claim was properly held to be property of the United States, it by no means follows a conclusion that it is *"as such,"* a debt due to the Uni States which is entitled to priority. This decision cann we submit, be accepted as a controlling or even a persuas authority on the question under consideration.

In the case of Davis *v.* Pullen, 277 Fed. 650, a credit bill had been filed against D'Arcy & Sons Co. and a recei had been appointed to take possession of its assets. Liqui

tion followed and the Director General filed a claim for freight charges arising out of Federal control and claimed priority of payment under Section 3466 R. S. The Court held that the proceeding came within the provision of the Act and allowed the claim for priority. No question of the Bankruptcy Act of 1898 was involved and the case is clearly not in conflict with the present decision. It may be noted that the Court, in commenting on the allowance of priority of payment, said:

> "There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvent."

The case of *in re* Atlantic Gulf & Pacific Co., 289 Fed. 145, was decided by a District Court of the Fourth Circuit and cannot be considered as authority here. That was a case where the United States claimed both a lien on the assets of a bankrupt concern and the right to priority of payment and the Court held there was no debt due the United States and dismissed its claims.

The case of Lott *v.* Salisbury, 237 Fed. 191, arose in the Fourth Circuit and was decided by the same Court which rendered the present decision. It cannot therefore be said to be a conflicting authority. It is difficult to see where the case is in point. The question there was as to the priority in bankruptcy of the rent claim of a landlord under a lien over the claim of a clerk for wages. The lien of the landlord was given priority.

The case of Davis *v.* Miller Link Co., 296 Fed. 649, is

equally not in point. This was a Receivership case in which the Director General filed a petition of intervention and claimed the right to priority of payment of a debt arising out of a contract made by him during Federal control with reference to the operation of a railroad.

The Court held that the case was similar to the case of Davis *v.* Pullen, *supra,* and that priority of payment should be allowed. The Bankruptcy Act of 1898 did not enter into the consideration of the case at all.

We shall now take up the cases referred to by the Circuit Court of Appeals.

In the case of Western Implement Co., 171 Fed. 81, the Circuit Court of Appeals merely approved and affirmed the decision of the Court below and we must look to the decision of the District Court, which is found in 166 Fed. 576, for the opinion.

The question here was as to the right of the State of Minnesota to priority of payment of a claim for binding twine manufactured by the State in its penitentiary. The Court held that the claim could only be sustained under the provisions of Sub-division b, Clause 5, Section 64 of the Bankruptcy Act of 1898, and that in order to determine this question the precise scope and meaning of the phrase "debts owing to any person" as appearing in clause 5, should be ascertained.

The Court reached the conclusion that as "persons" is defined in the Bankruptcy Act to include corporations, and as the word "corporations" is defined in the Act to mean "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships," and as a State is a body, having some of the powers and

privileges, that a State is a person, within the meaning of the Bankruptcy Act.

In further support of this finding the Court says with reference to the Act of 1797, Section 3466 of the Revised Statute:

> "This statute was enacted on March 3, 1797, c. 20, 1 Stat. 515, and has remained in force until the present day. It expresses the general policy of this Government with respect to the preference of debts due to the United States over debts due to its citizens. The various States of the Union have by legislative enactment declared the same public policy with respect to preferences of debts due the State, and this public policy of the various States has been recognized by Congress in at least one bankruptcy law, that of 1867. It is difficult to conceive that the Congress, when they enacted the national bankruptcy act of 1898, intended to render nugatory this policy of the Federal and State Government which had been so distinctly recognized for so many years, and that, too, by a mere failure to insert some express provision covering the subject. In my judgment, clause 5 of sub-division 'b' of section 64 was intended by Congress to fully preserve not only the rights of the several States, but the rights of the United States, with respect to priorities of debts from bankrupt estates.
>
> "It is to be observed also that, unless clause 5 of sub-division 'b' is accorded this construction, it cannot be given such a construction respecting a debt due to the United States, should such a case arise. This same clause which has been invoked by the Attorney General of the State of Minnesota to protect the priority of the State in this claim must be invoked by the United States whenever the National Government

seeks to prove any debt which it may have against a bankrupt estate. The bankruptcy act of 1800 (Act April 4, 1800, c. 19, par. 62, 2 Stat. 36), as well as the bankruptcy acts of 1841 (Act Aug. 19, 1841, c. 9, par. 5, 5 Stat. 444), and of 1867 (Act March 2, 1867, c. 176, 14 Stat. 531), par. 28, expressly recognize the priority of the debts due the United States, thus preserving in all of its essential features the provisions of section 3466 of the Revised Statutes relating to priorities, hereinbefore quoted. The bankruptcy act of 1898 contains no express provision preserving in so many words the priority of debts due the United States, and, if priority is to be accorded to such debts, the authority therefor must be found in clause 5, subd. 'b,' par. 64, of the bankruptcy act of 1898. I feel satisfied that the United States must be regarded as a 'person' within the meaning of that clause (*In re* Stoever [D. C.], 127 Fed. 394); and, by a parity of reasoning, I am forced to the conclusion that a State should likewise be regarded as a 'person' within the meaning of this law."

In view of the history of the steps taken in the passage of the Bankruptcy Act as set forth in the opinion of the Circuit Court of Appeals in the case at bar, it is evident there is no foundation for the surmise indulged in by the learned District Judge, which is also at variance with the decision of this Court in United States *v.* Fox, *supra*.

In the case of Tide Water Coal Exchange, decided by the Circuit Court of Appeals for the Second Circuit, 280 Fed. 648, in which a Writ of Certiorari was denied by the Supreme Court (260 U. S. 721; 43 Sup. Ct. 12), the question of the right to priority of payment under the Bankruptcy Act of 1898 was only incidentally before the Court. At a meeting

of creditors of the bankrupt, the Director General of Railroads who had proved a claim in bankruptcy attempted to vote for the trustee, but was refused the right to vote by the Referee, who based his refusal on the ground that the United States, through the Director General, was a creditor holding a claim which had priority and as such is not entitled to vote under the provisions of Section 56 "b" of the Bankruptcy Act. The order of the Referee was sustained by the District Court and by the Circuit Court of Appeals.

It does not appear that any dispute was made as to the correctness of the holding by the Referee that the Director General was a creditor who had priority. The position taken apparently by the Director General was that this was immaterial to his contention and that the right to vote at the meeting was a sovereign right which could not be taken away or limited by any Statute unless the United States was specifically mentioned therein and that, as Section 56 "b" of the Bankruptcy Act of 1898 which exempts from the right to vote, creditors having priority, does not in terms mention the United States, therefore it was not deprived of the right to vote. In other words, the question as to the right to priority of payment did not arise in this case at all.

The language used by the Court is as follows:

> "The Bankruptcy Acts of 1800, of 1841, and of 1867 expressly recognize the priority of debts due the United States, thus preserving in all its essential features the provisions in the Act of 1797, reproduced in Section 3466 of the Revised Statutes relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision, and if, under that Act priority is given, it must be because of clause 5, subd. (b), Sec. 64, which reads as follows: (5)

debts owing to any person who by the laws of the States or of the United States is entitled to priority.

"We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited and can assert its priority as given it under Section 3466 of the Revised Statutes, which is reproduced in the margin. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common law rule which entitles a sovereign to priority over other creditors of an insolvent. United States *v.* National Surety Company, 254 U. S. 73, 75; 41 Sup. Ct. 29; 65 L. Ed. 143."

The language of the Court is conclusive in form and is in direct conflict with the decision of the Circuit Court of the Court of Appeals for the Fourth Circuit. Besides the fact, however, that the question covered by this language did not arise in the case, it is clear that no special attention was paid by the Court to the legislative history of the section of the Bankruptcy Act under consideration nor to the decision of the Supreme Court of the United States in United States *v.* Fox, *supra*. The Court points out that there was a marked departure in the Bankruptcy Act of 1898 from the previous bankruptcy acts, with reference to priority of debts due the United States, and shows that it is only by giving to the word "person" a construction quite foreign to its real meaning that the priority of the United States under this Act can be maintained. When we see what the real history of the Act was, as is so fully set out in the opinion of the Circuit Court of Appeals in the case at bar, it is clear that it was never the intention of Congress that the word "person" should include the United States.

Moreover, it is very interesting to note just what the Circuit Court of Appeals for the Second Circuit did decide in this case. We find in the decision a very learned and interesting dissertation on sovereign rights and the prerogative of Kings, and attention is invited to certain citations from decisions rendered by the Supreme Court of the United States in the early seventies, at a time when sovereign powers and governmental prerogatives were much in vogue, indicating that certain royal prerogatives belonged to the United States as a State, just as much as they did to the British Crown. In the end, however, the Court takes away everything that it grants and holds specifically that the United States had no right to vote for the trustee. The Court says at page 652, "In providing that secured or priority creditors shall not be entitled to vote at creditors' meetings, no creditor is deprived of any right with which he had been previously invested. To hold, as the Court below did, that the United States, because it was a priority creditor, could not vote, did not deprive the United States of any existing prerogative or interest which it ever possessed. The rule that the United States as a sovereign is not bound by the general language of a statute unless named therein, ordinarily applies where a statute tends to restrain or diminish existing powers, rights or interests of the sovereign."

The Transportation Act of 1920 neither restrained nor diminished any existing powers, rights or interests of the sovereign. This Act and the Federal Control Act, vested in the Director General the powers which he has, and the right to collect debts arising out of the operation of the railroad system is an incident to the operation. Clearly the decision in this case does not establish the rights claimed by the Director General.

It is very interesting to read and analyze, in connection with the decision of the Circuit Court of Appeals for the Second Circuit, in the case of Tide Water Coal Exchange *supra*, the decision of the same Court, with an opinion written by the same Judge (Rogers, Circuit Judge) in the case of Equitable Trust Company of New York *v.* Connecticut Manufacturing Corporation, et al., 290 Fed. 712. It is made very clear in the latter decision that any comments made in the previous case on the sovereign powers of the United States was not intended to indicate an opinion by the Court that the United States was entitled under any theory of sovereignty to priority in the payment of its debts. In this case Plaintiff had brought suit as a creditor of the defendant Manufacturing Corporation in the United States District Court of Delaware, alleging gross mismanagement, and obtained the appointment of a receiver of the property of the defendant. Thereafter plaintiff also brought suit in the United States District Court for the District of Connecticut, and obtained the appointment of an ancillary receiver of the property of the defendant there. The United States intervened in the latter suit, claiming that the defendant was indebted to it in a large sum and asking for an Order for the payment of its debt before any other debts should be paid, under the provisions of Sections 3466 and 3467 of the Revised Statutes. The intervening petitioner alleged that the assets of the defendant were not sufficient to pay in full its liabilities but did not allege that the defendant debtor was insolvent.

The Court makes a most elaborate review of the decisions involving the priority statute from the case of United States *v.* Fischer, 2 Cranch. 258 to the recent decision of the Supreme Court in the case of United States *v.* State of Oklahoma, 261 U. S. 253 (43 Sup. Ct. 295), and states its conclusion as to the law as follows (page 723):

> "We think the decisions of the Supreme Court extending over a period of more than 100 years have clearly established the law that the right of the United States to priority of payment is statutory, and does not apply while the debtor continues the owner of the property, even though he is unable to pay his debts."

The Court says further (page 716):

> "We think it clear that whatever claim to priority the United States may assert does not rest upon the theory of sovereignty; it is no doubt true of common law that a sovereign is entitled to priority over the claims of individual creditors. That such a priority can be asserted by the sovereign is recognized in England in the earliest reported cases." * * *
>
> "There seems a marked difference of opinion in the several states as to whether or not the prerogative of the crown has been adopted by the states as part of their common law. It has been held in some states that it has been adopted. (Citing decisions), while in certain other states if the right exists at all, it is dependent entirely upon statute (citing decisions).
>
> "Whatever the rule may be in the several states, the question whether the United States has a common law of its own is quite a different matter. The Supreme Court has said on numerous occasions that there is no common law of the United States (page 718). * * *
>
> "As the United States has no common law, whatever right of priority in the payment of debts the United States possesses over other creditors exists because of some statute which confers it. It does not exist independently of statute."

We respectfully submit that the decision be affirmed for the following reasons:

1. The Federal Control Act and the Transportation Act of 1920 are complete in themselves, provide for no priority in payment of debts due the Government arising out of Federal control, and Section 3466 Revised Statutes is superseded by said acts and is not applicable to this case.

2. Under the Bankruptcy Act of 1898 and the history of legislative action leading to its passage and contemporaneous legislative construction of that act, the provision for priority to the United States contained in the earlier bankruptcy acts having been purposely left out, it was the clear intention of Congress that debts due the United States, other than for taxes, should not have priority of payment and Revised Statutes, Section 3466 is superseded by the Bankruptcy Act of 1898 as far as bankruptcy cases are concerned.

3. That the word "person" should not be construed out of its ordinary and natural meaning in order to defeat the plainly expressed intention of Congress in passing the Bankruptcy Act of 1898.

Respectfully submitted,

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